Supreme Court of the United States

OCTOBER TERM, 1961

No. ... 57

MICHAEL CLEARY,

Petitioner,

and.

UNITED STATES OF AMERICA, ROBERT G. ANDERSON, Secretary of the Treasury of the United States of America, Customs Agents WILLIAM J. O'SHEA and THOMAS F. LOUGHMAN, Customs Enforcement Officers WALTER J. CONLON and JOSEPH E. PATTERSON and DOROTHY T. ZECHA, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York,

Defendants,

v.

EDWARD BOLGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: December 22, 1961.

INDEX

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on August 4, 1961 (R.57a).

Opinions Below

The opinion of the District Court (R.9a-40a), is reported in 189 F. Supp. 237. The opinion of the Court of Appeals (R.45a-56a), printed in Appendix A hereto, *infra*, pages 15-24, is reported in 293 F. 2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1961 (R.57a; p. 28, *infra*).

Petition for rehearing *in banc* was denied on September 25, 1961, by the same panel of the Court of Appeals as originally sat on the instant case (R.68a). Then, the Court of Appeals, sitting *in banc*, divided three-to-three on the petition for rehearing and accordingly denied rehearing on September 26, 1961, for lack of a majority in favor thereof (R.72a).

An application by petitioner for leave to refile his petition for rehearing *in banc* was denied by all the active judges of the Court of Appeals on October 20, 1961 (R.80a-82a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether it was an improvident exercise of federal equitable power to enjoin petitioner, a state officer, from testifying or producing any evidence against respondent in both a state criminal and a state administrative proceeding against respondent (both of which state proceedings had been instituted and were pending at the time the instant suit was commenced) simply because petitioner was present (but did not participate) in an interrogation of respondent by federal customs officers while respondent was illegally detained by the federal customs officers, which detention followed an illegal search and seizure of respondent's home by the federal customs agents (at which search and seizure petitioner was not even present).

2. Whether such injunction was prohibited by the provisions of Section 2283 of Title 28 of the United States Code.

Statutes Involved

Section 2283 of Title 28, which is directly involved herein, provides as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement

The order of the District Court herein (R.40a-43a) enjoins petitioner, a state officer (*i.e.*, an investigator for the Waterfront Commission of New York Harbor) from testifying or producing any evidence against plaintiff (1) in a criminal proceeding pending against respondent in the Court of Special Sessions of the City of New York for petit larceny and (2) in a hearing pending against respondent before the Waterfront Commission to determine whether to revoke respondent's license as a hiring agent and respondent's registration as a longshoreman. Both the state criminal prosecution and the Commission's hearing had been instituted and were pending at the time the instant suit for an injunction was commenced in the District Court (R.5a-6a; complaint, pars. 15-17).

The facts, as found by the District Court (Bryan, J.), after trial, are as follows. Respondent is a hiring agent and longshoreman, licensed and registered, respectively, as such by the Waterfront Commission and he is employed on the New York waterfront (R.10a). On Saturday morning, September 12, 1959, at about 8:30 A.M., certain federal customs officers* who were on the lookout for thefts from

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* The term federal customs "officers" is used in this petition to include all the defendants below who are employees of the United States Customs, except the shorthand reporter.

the piers, particularly thefts of liquor, observed respondent take a cardboard carton from a deserted pier and place the carton in his car (R.12a). Upon a search of both respondent's person and his car, the customs officers found in respondent's car two windshield wipers and six spark plugs stamped "Made in England" (R.12a-13a). In addition, respondent, when questioned, said that he had six or eight bottles of liquor at home which he had bought from crew members (R.13a). At about 9:00 A.M. the customs officers decided to take respondent into custody (R.13a). (The District Court found that the initial arrest and search were legal (R.27a-29a)).

Respondent was taken to an office of Customs in New York City and, after some preliminary questions, he admitted that he had some thirty or forty bottles of liquor obtained from seamen, and additional merchandise, at his home in Keansburg, New Jersey (R.13a). Later in the interrogation, respondent signed a written consent to a search of his home (R.13a-14a), which the District Court found to be void and of no effect (R.31a-32a).

Shortly before 11:00 A.M. the customs officers, together with respondent, left New York in a government car for respondent's house in Keansburg, New Jersey, where they arrived about noon (R.15a). A search was made of respondent's house for about two hours, during which certain apparently contraband merchandise was found (R.15a). (The District Court found that a United States Commissioner was in attendance at the United States Court House a few blocks away from the office of Customs from about 11:00 A.M. to 1:00 P.M. (R.17a).)

The federal customs officers, together with respondent, left Keansburg, New Jersey, at about 2:00 P.M. and they arrived at one of the offices of Customs in New York City at about 4:00 P.M. (R.15a). The Waterfront Commission, which worked in close cooperation with Customs, had been informed of respondent's detention (R.15a). Petitioner,

who was present at the Customs office upon respondent's return from his home, ascertained that respondent had a key to the basement of an apartment house in New York City which respondent occasionally used to repair pier equipment (R.16a). Petitioner and a customs officer drove respondent to the basement tool room which was searched without finding anything (R.16a). Petitioner and the customs officer then returned with respondent to the office of Customs at about 5:45 P.M. (R.16a). (Since no incriminating evidence was found in this search, it is not a factor in the decision herein.)

Respondent was then asked if he was willing to make a statement concerning the merchandise seized from his home (R.16a). Respondent was told that he did not have to make such a statement and that anything said could be used against him (R.16a). Respondent apparently did not object and he was sworn and questioned before a customs shorthand reporter (R.16a). Petitioner, who was present, did not participate in the questioning (R.16a). During the course of this questioning, respondent made some incriminating statements (R.16a). The questioning concluded at about 7:00 P.M. and respondent was permitted to leave at about 7:20 P.M. (R.16a).

The District Court found that respondent's house had been illegally searched and that property had been illegally taken therefrom by the federal customs officers; that, after such illegal search and seizure, respondent had given a highly incriminating statement before a customs reporter while illegally detained (after 11:00 A.M.) by the customs officers without being brought before a United States Commissioner (who was in attendance nearby from 11:00 A.M. to 1:00 P.M.); that the detention and search and seizure were illegal by virtue of being violative of Rules 5(a) (prompt arraignment) and 41 (issuance of warrant for search and seizure), respectively, of the Federal Rules of Criminal Procedure; and that respondent's statement resulted from both the illegal detention and the illegal search and seizure (R.29a-34a).

The District Court issued an injunction prohibiting the federal customs officers and also the customs shorthand reporter in effect from testifying or producing any evidence in any state proceeding against respondent (R.34a-35a; 40a-43a). The District Court granted this injunction in the exercise of its supervisory powers over federal law enforcement agents (R.35a). (The defendants herein originally included the United States of America and Robert G. Anderson, Secretary of the Treasury; the action as against these defendants was dismissed upon motion before trial (R.11a).)

With respect to petitioner, the District Court made the following findings (R.37a-38a):

> "In the case at bar the wrongful activities were all those of federal officers and were conducted or directed by them. All that was done during the period of unlawful detention, and particularly the taking of the incriminating statement from Bolger, was being done on behalf of the United States. Cleary [petitioner] was merely a witness to them . . ."

However, the District Court granted a similar injunction against petitioner (R.40a-43a). The ground for the injunction against petitioner was that it is necessary in order to effectuate, and as an incident to, the injunction against the federal customs officers because petitioner "participated as a witness in the unlawful acts of the federal officers acting on behalf of the United States" (R.38a). (Respondent also instituted a second injunction action against the Commission, itself, and its two members, which the District Court dismissed (R.39a-40a).)

Petitioner appealed to the Court of Appeals. While a notice of appeal was filed on behalf of the federal customs officers and the customs shorthand reporter, this appeal was dismissed pursuant to stipulation.

By judgment and decision dated August 4, 1961, the Court of Appeals affirmed the District Court by a split vote (R.45a-57a). This decision was rendered by a panel comprised of Circuit Judges Clark and Waterman and also District Judge Anderson (who dissented).

Petitioner filed a petition for rehearing *in banc* dated August 18, 1961 (R.59a-67a). On September 25, 1961, this petition for rehearing was denied by the original panel of the Court of Appeals, Circuit Judges Clark and Waterman voting to deny the petition and District Judge Anderson voting to grant the petition (R.68a). Then, on September 26, 1961, the Court of Appeals entered the following decision with respect to petitioner's petition for rehearing *in banc* (R.72a).

> "Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application."

Subsequently, by application dated October 10, 1961, petitioner applied for leave to refile his petition for rehearing *in banc* so as to give the newly appointed Judges of the Court of Appeals an opportunity to vote upon the matter (Circuit Judges Hays, Kaufman and Marshall) (R.76a-78a). This application was denied by order of the Court of Appeals dated October 20, 1961, "[a]ll the active judges concurring" (including Judge Kaufman) (R.80a-82a).

Reasons for Granting the Writ

I

The 2-1 decision by the court below (which upon petition for rehearing *in banc* divided 3-3) reflects the confusion and conflict existing in the lower federal courts over the

propriety of federal injunctive interference with state criminal (and administrative) proceedings to enjoin the use of evidence allegedly obtained in violation of federal law. Such confusion and conflict upon questions of paramount importance to federal-state relationships in the area of law enforcement insistently call for resolution by this Court.

A. The decision by the court below is in conflict with the applicable decisions of this Court. In *Stefanelli* v. *Minard*, 342 U. S. 117, suit was brought under the Civil Rights Act to enjoin the use in a criminal trial in the State of New Jersey of evidence obtained by New Jersey Police in a search and seizure which, if made by federal officers, would concededly have violated the Fourth Amendment. This Court, however, declined to decide whether the complaint stated a cause of action under the Civil Rights Act but instead held that an exercise of federal equitable jurisdiction in such circumstances would be improper, stating in substance that a proper accommodation between federal equitable power and state administration of its own law required that "the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure" (342 U. S., at p. 120) and that "[i]f we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption" (342 U. S., at p. 123).

Stefanelli was followed by the decisions of this Court in *Rea* v. *United States*, 350 U. S. 214 and *Wilson* v. *Schnettler*, 365 U. S. 381. In the recent decision in Wilson, this Court refused to enjoin federal narcotics agents from testifying and producing evidence in a state criminal proceeding. The Court distinguished its previous decision in the *Rea* case wherein it did so enjoin testimony by a federal narcotics agent, because in *Rea* the illegal search and seizure evidence had been ordered suppressed in a

prior federal criminal prosecution against the same criminal defendant, the effect of the suppression order being that the suppressed property "shall not be admissible in evidence at any hearing or trial" and because in *Rea* the motion to enjoin was thus made "to prevent the thwarting of the federal suppression order." *Wilson* v. *Schnettler*, *supra*, 350 U. S. at page 387.

This Court held in *Wilson* that the complaint therein had been properly dismissed upon the alternative grounds (1) that, though the complaint alleged that the arrest was made without a warrant, there was no allegation that the arrest was made without probable cause and (2) that there was no federal equitable jurisdiction to interfere with the state criminal proceeding for the reasons enumerated in *Stefanelli*. However, the basic premise of the decision herein by the court below is that this Court's decision in *Wilson* rested *solely* upon ground that the complaint failed to allege that the seizure was illegal. If this were true, then plaintiff therein, by hypothesis, had no basis whatever for being in federal court; his complaint was dismissible out of hand; and there was no need to discuss and distinguish, as this Court did at length, its prior opinion in the *Rea* case. Further, this Court in *Wilson* plainly and explicitly stated that it was not resting solely on the defectiveness of the complaint but also upon the principles previously enunciated in *Stefanelli*, that is, that the federal courts should not interfere by injunction with state criminal proceedings because of a claimed violation of constitutional rights (365 U. S. at pp. 385-86).

Hence, *Wilson* makes crystal clear that the decision in *Rea* is narrowly limited to particular facts therein and that the principle laid down by this Court in *Stefanelli* remains unimpaired and retains its full vitality. In fact, where, as here, the federal writ is sought against a state officer, the principle of *Stefanelli* becomes applicable even with greater force than where federal officers, as in the *Wilson* case, are the persons sought to be enjoined.

That the instant case does not warrant federal equitable interference with a state criminal prosecution follows from the recent decision by this Court in *Pugach* v. *Dollinger*, 365 U. S. 458. In *Pugach*, a federal injunction against the use of state wiretap evidence in a state criminal prosecution was denied by this Court in a short *per curiam* opinion citing *Stefanelli*.

The policy expressed by this Court in *Stefanelli* against federal judicial interference with state criminal proceedings is reinforced by the recent decision by this Court in *Mapp* v. *Ohio*, 367 U. S. 643, holding that the state courts are constitutionally required to exclude illegal search and seizure evidence. For now of course there is less reason that equity interfere with the proceeding at law. If respondent's rights under the *Mapp* rule are violated, relief is available in the state proceeding and, further, appropriate review is also available in this Court. Consequently, respondent should be remanded to the usual and time-honored remedies at law in the state courts. In this connection, the Court of Appeals of the State of New York has recently held (November 30, 1961) that the *Mapp rule* excluding evidence obtained by an unreasonable search and seizure is to applied even to pre-*Mapp* convictions if an appeal were pending at the time of the decision in *Mapp* by this Court. *People of the State of New York* v. *Loria*, New York Law Journal, page 1, col. 1, December 18, 1961.

The principle laid down in *Stefanelli* is equally applicable to a hearing by state law enforcement agency such as the Waterfront Commission. The Commission is charged with the task of eliminating racketeering and other evils on the New York waterfront. See, generally, *DeVeau* v. *Braisted*, 363 U. S. 444. Accordingly, no valid distinction can be drawn, insofar as *Stefanelli* is concerned, between the state criminal prosecution pending in the New York courts and the hearing pending before the Commission. In fact, both are simply different

aspects of related state action. Further, upon established principles of administrative law, respondent's application to enjoin petitioner's testimony before the Commission is premature since he must first exhaust his administrative remedies. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. In this connection, the provisions in the Waterfront Commission Compact (McK. Unconsol. Laws 9851), approved by Congress, that the Commission is subject to judicial review by a proceeding instituted in either state in the manner provided by the laws of such state for review of "the *final* decision or action of administrative agencies of such state" should be dispositive.

B. Moreover, the decision herein is squarely in conflict with the decision by the Seventh Circuit in the *Wilson* case (275 F. 2d 932). Whatever may have been the ground of affirmance by this Court in *Wilson*, it is clear that the Seventh Circuit did not rest its decision upon the failure of the complaint to allege that the arrest was made without probable cause, for this fact was not even adverted to by the Seventh Circuit. Accordingly, it is patent that the Seventh Circuit would *a fortiori* have refused to issue an injunction in the instant case against petitioner, a *state* officer, and that a conflict exists between the decision herein and the decision by the Seventh Circuit in *Wilson*, which has not been resolved to the satisfaction of the court below by this Court's subsequent decision in *Wilson*.

Indeed, the court below is itself in even conflict herein. For, as noted, the court below, sitting *in banc*, divided three-to-three upon petitioner's petition for rehearing and accordingly denied rehearing "for lack of a majority in favor of the application" (R. 72a). And if we count the District Court (Bryan, J.) and District Judge Anderson who sat on the original panel of the Court of Appeals, the judges herein divided four-to-four.

Apart from the propriety of federal equitable interference with state proceedings, there is also a conflict

in decision as to whether the Federal Rules of Criminal Procedure have the effect of independent substantive law enforcible as such notwithstanding the fact that no federal criminal prosecution has ever been instituted. The decision below holds that the Federal Rules do have such independent force, while the Seventh Circuit held explicitly to the contrary in the decision in *Wilson* (275 F. 2d 932, 935).

C. Insofar as we are aware, the decision herein is completely without precedent. It constitutes the first time, to our knowledge, that a federal court has ever enjoined a *state* official from testifying in a state criminal proceeding. Stated more broadly, the decision herein constitutes the first time, to our knowledge, that a federal court has ever interfered by injunction with *state* conduct of a state criminal proceeding.

The importance of the decision herein to federal-state relationships is self-evident. As stated by Judge Anderson in his dissenting opinion (*infra*, p. 24):

> "Moreover, the practical consequence [of the decision herein] would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the 'insupportable disruption' which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951)."

A question of this importance fully warrants, we respectfully submit, review by this Court.

II

The District Court based federal jurisdiction herein upon the Civil Rights Act (R. 25a). There is a conflict of decision in the federal courts as to whether a suit under the Civil Rights Act comes within the exception of Section 2283 of Title 28 of the United States Code (*supra*, p. 3) prohibiting an injunction to stay state court proceedings "except as expressly authorized by Act of Congress".

Section 2283 expresses a long-standing rule of comity, for its "a limitation of the power of the federal courts dating almost from the beginning of our history in expressing an important Congressional policy—to prevent needless friction between state and federal courts". *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9. Further, the prohibition in Section 2283 is against a stay of "proceedings" in a state court, a term which is "comprehensive" and which "includes all steps which may be taken in the state court or by its officers from the institution to the close of the final process". *Hill* v. *Martin*, 296 U. S. 393, 403. Since the order below has the effect of effectively preventing New York from prosecuting respondent, it follows that the order below is within the interdiction of Section 2283.

The court below on this issue simply stated that the decision by this Court in *Rea* was "ample authority for holding that the order appealed from is not barred by 28 U.S.C. § 2283" (*infra*, p. 18). But, as noted, in *Rea*, the motion to enjoin was made "to prevent the thwarting of the [prior] federal suppression order" therein. *Wilson* v. *Schnettler, supra*, 350 U. S. at page 387. Accordingly, the injunction in *Rea* was clearly ancillary to the prior suppression order and therefore came within the express exception of Section 2283 prohibiting a stay of state court proceedings by a federal court "except . . . where necessary . . . to protect or effectuate its judgments", the term "judgment"

encompassing interlocutory as well as final orders. *Sperry Rand Corporation* v. *Rothlein*, 288 F.2d 245, 248-49 (2nd Cir. 1961).

There remains the question whether a suit under the Civil Rights Act is subject to the prohibition of Section 2283. This question, as noted, has engendered a conflict in decision, some decisions holding that the Civil Rights Act is not within this exception to Section 2283, *Smith* v. *Village of Lansing*, 241 F.2d 856 (7th Cir. 1957); *Island Steamship Lines, Inc.* v. *Glennon*, 178 F. Supp. 292 (D. Mass. 1959), while others are to the contrary: E.g., *Copper* v. *Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950); *International Longshoremen's & Warehouse Union* v. *Ackerman*, 82 F. Supp. 65, 106-112 (D. Hawaii 1948), rev'd upon another ground, 187 F.2d 860, cert den., 342 U. S. 859. This is another conflict in decision which requires resolution by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Dated: December 22, 1961.

APPENDIX A

Opinion of the Court of Appeals

(Decided August 4, 1961)

Before

CLARK and WATERMAN, *Circuit Judges*, and ANDERSON, *District Judge*.

CLARK, *Circuit Judge*:

This case presents the question whether a federal court has the power to enjoin a state official from testifying in a state proceeding to information learned by him as a result of his co-operation with federal officials in an illegal search and seizure and an illegal detention.

The plaintiff, Edward Bolger, is a hiring agent and longshoreman licensed by the Waterfront Commission of New York Harbor and employed on the New York waterfront. On September 12, 1959, some federal customs enforcement officers were on the lookout for thefts from the piers, and they observed the plaintiff take a cardboard carton from a deserted pier and place the carton in his car. In the course of their ensuing investigation, they searched plaintiff's New Jersey house in violation of Fed. R. Crim. P. 41, and obtained incriminating admissions from the plaintiff during a detention which violated Fed. R. Crim. P. 5(a). On the authority of *Rea* v. *United States*, 350 U. S. 214, the court below enjoined the various officials involved from testifying in state proceedings to the fruits of their illegal activities. To make its decree effective, the court extended the scope of the injunction to include defendant Cleary, an investigator for the Waterfront Commission of New York Harbor. D. C. S. D. N. Y., 189 F. Supp. 237. Cleary was not present at the time of the illegal search and seizure, but, at the invitation of the Customs Service, witnessed the subsequent interrogation of the plaintiff during part of his illegal detention by federal officials. Though Cleary did not

participate in the questioning, he was free to do so had he wished.

The district court enjoined Cleary from testifying, in any Waterfront Commission hearing against plaintiff, with respect to transactions and statements subsequent to 11:00 a.m. on September 12, 1959 (the time that the illegal detention and illegal search and seizure began), and from producing any property illegally seized during the illegal search of plaintiff's New Jersey house. The order also enjoined Cleary from giving any testimony or producing any evidence in state criminal proceedings against the plaintiff with respect to statements obtained by federal officials during plaintiff's illegal detention. The present appeal is taken by defendant Cleary from that part of the district court order pertaining to him. The other defendants do not appeal, and Cleary concedes for purposes of his appeal the illegality of the conduct of the various federal officials.

Defendant's main point on this appeal is that the order below constitutes an unwarranted interference with the administration of criminal justice by the states. A federal court will not enjoin the use in state courts of evidence obtained by an unreasonable search by state police, *Stefanelli* v. *Minard*, 342 U. S. 117, or obtained by state police through violation of the Anti-Wire Tapping Act, *Pugach* v. *Dollinger*, 365 U. S. 458. On the basis of this line of authority, defendant argues that the order below cannot be sustained. Defendant Cleary, an investigator for the Waterfront Commission of New York Harbor, is an official of a bistate agency of New York and New Jersey. The proceedings in which his testimony is forbidden are a state prosecution for petit larceny and a Waterfront Commission hearing to determine whether plaintiff's license as a hiring agent and his registration as a longshoreman should be revoked. It is urged that a consideration for the proper balance between the state and federal governments requires the federal court to stay its hand in the present case, lest the work of the state courts be unduly disrupted.

The answer to this contention is that the federal courts will make an exception to this principle of noninterference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure. In *Rea* v. *United States, supra*, 350 U. S. 214, 217, the Supreme Court directed the district court to enjoin a federal narcotics agent from testifying in a state prosecution with respect to narcotics seized by him in an illegal search. The court could assume jurisdiction in the exercise of its "supervisory powers over federal law enforcement agencies." We think the *Rea* case compels the conclusion that the order below was proper. In *Rea*, a federal official was disabled from passing the fruits of his illegal activities on to the state through testimony at trial. In the present case the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention. If the integrity of the judicial process stated in the Federal Rules of Criminal Procedure is not to be subverted by the former method, it must be similarly protected against subversion through the latter method. The only difference between the two cases is the time at which the federal officials attempt to make the results of their lawbreaking available to the state. We do not think that this difference justifies a distinction in law, or justifies so easy a means of evading federal law for the protection of the accused.

Defendant attempts to distinguish the *Rea* case, 350 U. S. 214, 217, on the ground that, as the Supreme Court there pointed out, "no injunction [was] sought against a state official." But the defendant Cleary is not being enjoined in his capacity as a state official, but as a witness invited to observe illegal activity, by federal agents. If the court can enjoin federal agents from passing on the fruits of their illegal activity to the state, the court has power to make its decree effective by extending the injunction to any

third party invited by the federal agents to witness the securing of statements or other evidence. That the third party happens also to be a state official is not, in our view, an excusing circumstance.

The defendant also seeks to distinguish *Rea* on the ground that there the accused, prior to the commencement of the state prosecution, had been indicted under federal law, and had obtained a suppression order under Fed. R. Crim. P. 41(e) against use of the illegally obtained evidence in that or in any other prosecution. But the majority opinion in *Rea* nowhere relied on the existence of the prior suppression order, or the fact that a prior federal indictment had been brought. Nor can we see any rational justification for holding that the disability from giving testimony in state proceedings, based on the need to protect the integrity of the process stated in the Federal Rules of Criminal Procedure, depends on the existence of a prior federal indictment or suppression order. Defendant contends that such a narrow construction of *Rea* is indicated by the recent Supreme Court decision in *Wilson* v. *Schnettler*, 365 U. S. 381, sustaining the dismissal of an action to enjoin federal agents from testifying in a state court and from there producing narcotics seized by them. But in *Wilson* the complaint failed to allege that the seizure was illegal, and this was the basic reason for the court's failure to follow *Rea*. While the *Wilson* opinion notes that *Rea* was different in that earlier federal proceedings had occurred, the opinion declined to rely on this fact as an independent ground for distinguishing *Rea*, and ultimately rested on the insufficiency of the allegations of the complaint.

We think the *Rea* case ample authority for holding that the order appealed from is not barred by 28 U.S.C. § 2283 as an injunction to stay proceedings in a state court.

We need now to consider whether late developments may not have rendered the injunction unnecessary. When this

action was pending in the court below, plaintiff had no adequate remedy in a state court; because the then prevailing doctrine of *Wolf* v. *Colorado*, 338 U. S. 25, and *Schwartz* v. *Texas*, 344 U. S. 199, permitted the states to receive evidence obtained in an unreasonable search and seizure or in violation of a federal statute. On June 19, 1961, in *Mapp* v. *Ohio*, 81 S. Ct. 1684, the Supreme Court overruled *Wolf* v. *Colorado*, *supra*, and held that state courts must exclude evidence obtained in an unreasonable search and seizure. If it were clear that *Mapp* barred all use by the state of the illegally obtained evidence here involved, the injunction below could properly be dissolved, not so much because of federal-state relations as of the traditional principle that equity will not act where there is an adequate remedy elsewhere. The scope of *Mapp* is, however, unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission. Moreover, it is our understanding that a rehearing of *Mapp* is being sought, thus leaving the question still open for some months. Hence we find no present justification for dissolving the injunction. Should the various problems left unsolved by *Mapp* be clarified, so that it becomes clear that the injunction is in fact unnecessary, the district court, on application of any party in interest, may order its dissolution.

Order affirmed.

ANDERSON, *District Judge* (dissenting):

While I agree with the majority that Judge Bryan's order should be affirmed, I am of the opinion that, as a result of the intervening decision of the Supreme Court in *Mapp* v. *Ohio*, June 19, 1961, the injunction should now be

dissolved. I must, therefore, dissent from that portion of the majority's decision which continues the injunction in effect.

The reason given in the majority opinion for not dissolving the injunction is that equity must act because there is no adequate remedy elsewhere, i.e., in this case, in the state court of New York; and the reason there is no remedy in the state court is that, while *Mapp* v. *Ohio*, now requires state courts to exclude evidence obtained in violation of the unreasonable search and seizure provision of the Fourth Amendment, the *Mapp* case is, nevertheless, "unclear in several regards, such as its application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission." The use of the phrase "as well as constitutional" implies that *Mapp* is clear enough where the evidence sought to be used in a state court was obtained as the result of an unreasonable search and seizure. In any event, the opinion of the Court in the *Mapp* case said, "we hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." This appears to be reasonably explicit. That this is also binding upon the Waterfront Commission is implicit in the Court's discussion in the *Mapp* case of the protection afforded by the Fourth Amendment to the citizens' rights to privacy. It is also supported by civil cases to which the Fourth Amendment has been held to apply. *Rogers* v. *United States*, 97 F.2d 691 (1st Cir. 1938); *Ex parte Jackson*, 263 Fed. 110 (D. Mont. 1920); *Schenck ex rel. Chow Fook Hong* v. *Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Tovar* v. *Jarecki*, 83 F. Supp. 47 (N. D. Ill. 1948). See also *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 at 392.

There is no question that in the present case Bolger's confession was procured through violations of Rule 5(a)

F. R. Crim. P. *and* of the Fourth Amendment. Judge Bryan said, "It needs no further discussion to demonstrate that the incriminating statement was the result of a clear violation of Rule 5(a) of the Federal Rules of Criminal Procedure *and of the illegal search and seizure* and I so find." 189 F. Supp. at 254 (emphasis added):

As the procurement of Bolger's confession was in violation of the Fourth Amendment, the decision in *Mapp* v. *Ohio*, requires the state court of New York to hold it inadmissible in evidence; Bolger, therefore, has his remedy in the state court, and the injunction issued by the court below is now unnecessary and should be dissolved.

There may be some concern lest the New York court find that the Fourth Amendment does not render the confession inadmissible here, because Cleary, the state officer, did not actually participate in the illegal search and seizure and only participated in getting the confession, by his presence, though other state agents had questioned Bolger. But it would take some lively sophistry on the evidence adduced here to find that the confession was not a fruit of the illegal search and seizure. That "fruits" are proscribed by the *Mapp* case is apparent from the discussion on page 16 (slip sheet opinion), and by the references on p. 6 to *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920); see also *Nardone* v. *United States*, 308 U. S. 338 (1939); *Somer* v. *United States*, 138 F.2d 790 (2d Cir. 1943).

The reasoning of the majority seems to be that because there is a risk that the state court may not apply *Mapp* to the facts of this case, and because *Mapp* is "unclear" as to whether or not it compels the states to follow federal statutes and rules enacted to implement and preserve constitutional rights, the doctrine of *Rea* v. *United States*, 350 U. S. 214 (1955) should be extended to cover a *state official* testifying in a *state court prosecution*, to preserve the integrity of federal rules and statutes.

Appendix A

The *Rea* case stands for the proposition that the district courts have a duty to enjoin *federal law enforcement agents* from testifying in a state court prosecution concerning evidence illegally gained. This ruling was made in a case where it was perfectly clear that the federal agent, balked by the federal rules from using the illegally gained evidence in the district court, where the evidence was suppressed, with the specific intent of using it in the state court, himself "swore to a complaint before a New Mexico judge and caused a warrant for petitioner's arrest to issue." To bring the present case within the "fall-out" area of *Rea* the majority say "the federal officials attempted to pass the fruits of their illegal activities on to the state by calling in state officials at the time of the illegal detention." This finding of intent and purpose was never made by the trial court. The most said by the trial court in its finding was, "The Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's detention." Later in its discussion the trial court said, "He (Cleary) was present at the questioning as a representative of the Waterfront Commission * * * This was the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront," and later, "Cleary was present at the questioning by invitation of the Customs Service." Nowhere is there anything to indicate that this invitation and cooperation was part of an evil purpose of the federal agents to "attempt to pass the fruits of their illegal activities on to the state" to promote a prosecution there, which could not be carried out in the federal court. There is nothing to show that Cleary's presence came about as the result of anything more than what the Supreme Court referred to in *Elkins v. United States*, 364 U. S. 206 at 211 as "* * * the entirely commendable practice of state and federal agents to co-

operate with each other in the investigation and detection of criminal activity." Cleary was not present at the confession merely as a casual by-stander or as a witness or as a "human recorder"; he was a law enforcement officer of the State of New York, present in the course of his official duties.

There was good reason at the time of the issuance of the injunction by the trial court, before the Supreme Court's holding in *Mapp* v. *Ohio*, *supra*, to include within its reach, Cleary, the state official, to prevent a violation of Bolger's constitutional rights, for Bolger then had no other recourse. To continue it now is, in effect, saying that, though the state court is now bound to protect Bolger's rights under the Fourth Amendment, *Mapp* does not make it clear that the state courts are bound to protect Bolger against a violation of Rule 5(a) F. R. Crim. P., and the federal courts must, therefore, enjoin a state agent from testifying in a state court to insure the integrity of the application of that federal rule. This, to my mind, is an unwarranted invasion of the rights and powers of the states.

To attempt to base a rule on the degree or weight of the state agent's participation in a joint enforcement endeavor is wholly impractical. Either the law should be that the use in the state courts of all evidence obtained by state agents, illegally under federal rules or statutes, shall be enjoined by the district courts where, in procuring that evidence, the state agents have been assisted, in whole or in part by federal agents; or the law should be that the admissibility of such evidence in the state courts shall be left wholly in the power of the state courts. The majority decision which leans toward the former principle means that in every case where there has been any degree of "commendable cooperation" between federal and state enforcement officers, and there are involved federal constitutional rights which the states must recognize, the states are also

bound to recognize and apply federal statutes or rules of procedure, made to implement and preserve them, or have their state proceedings disrupted by a federal court's injunction, if they fail to do so. To require the states to follow and apply congressional enactments and the rules of the federal courts in this fashion would constitute a long step toward the destruction of the division of powers. It is directly contrary to *Pugach* v. *Dollinger*, 365 U. S. 458 (1961).

Moreover, the practical consequence would be that in nearly all cases where there had been any contact at all between federal and state enforcement officers, leading to a state prosecution, a question would be raised in the district courts by means of a petition for an injunction to determine whether or not such federal statutes or rules had been complied with. Meanwhile, the district court would be compelled to stay the state court proceedings until it had had an opportunity to hear and decide the matter. It takes no major prophet to envisage the "insupportable disruption" which would result. *Stefanelli* v. *Minard*, 342 U. S. 117, 123-125 (1951).

I must disagree with this extension of the holding in the *Rea* case. The plaintiff's rights under the Fourth Amendment must now, in the light of *Mapp* v. *Ohio*, *supra*, be protected by the courts of the State of New York. He has his remedy there, and the injunction issued by the federal court should now be dissolved.

Appendix A.

Order of the District Court.

The plaintiff herein having served and filed his complaint demanding a permanent injunction against the above named defendants, as appears more fully by said complaint and the prayer for relief therein contained and said action and issues therein having been joined by the answer of the defendants herein, and the trial having come on before me and having been had, and after hearing the evidence adduced by the plaintiff and the defendants herein and upon due consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon and Joseph E. Patterson are hereby enjoined from testifying in the State criminal proceedings with respect to any evidence obtained during the illegal search and seizure conducted at the house of Edward Bolger, plaintiff, in Keansburg, New Jersey on September 12, 1959 and from turning over to State Law Enforcement Authorities and producing in any State criminal proceeding any property seized at the house of Edward Bolger, plaintiff, on that day, including the Stenorette tape-recording machine, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha are hereby enjoined from testifying as to any statements made by the plaintiff, Edward Bolger, after his departure from Enforcement Headquarters of the United States Customs at 54 Stone Street, City, County, State of New York and the Southern District of New York at about 11 o'clock A. M. on September 12, 1959, including the statement in question and answer form taken from the plaintiff beginning at about 6 o'clock P. M. on that day, and from turning over the transcript of any statement or statements taken from the

plaintiff herein, Edward Bolger, during such period to State law enforcement authorities, or from producing such transcript in any State criminal proceedings, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph Patterson, Dorothy T. Zecha and Michael Cleary are hereby enoined with respect to transactions and statements subsequent to 11:00 A. M. on September 12, 1959 from giving any testimony or producing any statements in question and answer form, or other statements or producing any evidence before the Waterfront Commission of New York Harbor at any hearing or trial conducted by the said Waterfront Commission of New York Harbor against the said plaintiff, Edward Bolger, with respect to any statements, in question and answer form made on September 12, 1959 and producing any property illegally seized during the unlawful search of plaintiff's house at Keansburg, New Jersey on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Michael Cleary is hereby enjoined from giving any testimony or producing any evidence or statements either oral or in question and answer form obtained by him from defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson and Dorothy T. Zecha on September 12, 1959 in any State criminal proceedings against the plaintiff herein, Edward Bolger, with respect to any statements, including the statement in question and answer form while the plaintiff was illegally detained at 201 Varick Street, City, County, State of New York and the Southern District of New York on September 12, 1959, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff Bolger's application for an order directing the return to him of the properties seized by defendants William J. O'Shea, Walter J. Conlon and Joseph E. Patterson at plaintiff's home at Keansburg, New Jersey on September 12, 1959 be and hereby is denied and that the said merchandise be retained in the possession, custody and control of the Collector of Customs of the Port of New York for disposition in accordance with the Customs Laws and Regulations, but without prejudice to such further proceedings by the plaintiff with respect to such properties as may be authorized by law, and it is further

ORDERED AND ADJUDGED that the defendants William J. O'Shea, Thomas F. Loughman, Walter J. Conlon, Joseph E. Patterson, Dorothy T. Zecha and Michael Cleary pay the costs of these proceedings, exclusive of plaintiff's attorney's fees, as taxed by the Clerk.

Dated: New York, N. Y., December 20, 1960.

FREDERICK V. P. BRYAN,
U. S. D. J.

Rec'd in Clerk's Office: 12/21/60.
Judgment Entered: 12/21/60.

HERBERT A. CHARLSON,
Clerk.

Appendix A

Judgment of Affirmance of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-one.

Present: HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
Circuit Judges,
HON. ROBERT P. ANDERSON,
District Judge.

EDWARD BOLGER,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants,

MICHAEL CLEARY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix A

Decision of the Court of Appeals dated September 25, 1961 Denying Rehearing

Before CLARK and WATERMAN, Circuit Judges, and ANDERSON, District Judge.

On Petition for Rehearing.

William P. Sirignano, Gen. Counsel, and Irving Malchman, Asst. to the Gen. Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

PER CURIAM.

Petition for rehearing denied.

C. E. C.,
S. R. W.,
U. S. C. J.J.

I dissent and vote to grant.

R. P. A.,
U. S. D. J.

September 25, 1961

Appendix A

Decision of the Court of Appeals dated September 26, 1961 Denying Rehearing *In Banc* for Lack of a Majority in Favor Thereof

Before LUMBARD, Chief Judge, CLARK, WATERMAN, MOORE, FRIENDLY and SMITH, Circuit Judges.

On Petition for Rehearing In Banc.

William P. Sirignano, General Counsel, and Irving Malchman, Assistant to the General Counsel, Waterfront Commission of New York Harbor, New York City, for petitioner-appellant Michael Cleary.

Judges Lumbard, Moore and Friendly having voted to grant the application, and Judges Clark, Waterman and Smith having voted to deny, the application is denied for lack of a majority in favor of the application.

J. EDWARD LUMBARD,
Chief Judge.

26 September 1961

Appendix A

Decision of the Court of Appeals dated October 20, 1961 Denying Leave to Refile Petition for Rehearing *In Banc*

MOTION FOR LEAVE TO REFILE PETITION FOR REHEARING IN BANC

William P. Sirignano, New York, N. Y., for appellant.

All the active judges concurring, the motion is denied.

J. EDWARD LUMBARD,
Chief Judge.

October 20, 1961